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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 824.

BARBARA ANN ELLIOTT, CLIFFORD ELLIOTT, RUBY MAE ELLIOTT, a Minor, and MARY ANN ELLIOTT, a Minor, *Petitioners*,

vs.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, A CORPORATION, and FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, A CORPORATION, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETE FARABI,
Professional Building,
Pittsburg, Kansas,
EDWARD V. SWEENEY,
200 Central,
Monett, Missouri,
Attorneys for Petitioners.

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BARBARA ANN ELLIOTT, CLIFFORD ELLIOTT, RUBY MAE ELLIOTT, a Minor, and MARY ANN ELLIOTT, a Minor, *Petitioners,*

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THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, A CORPORATION, and FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, A CORPORATION, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners herein seek review by this Court of an opinion and judgment entered by the United States Circuit Court of Appeals for the Tenth Circuit in the case of Barbara Ann Elliott, Clifford Elliott, Ruby Mae Elliott, a minor, and Mary Ann Elliott, a minor, Appellants, vs. The Metropolitan Casualty Insurance Company of New York, a corporation, and Firemen's Insurance Company of Newark, New Jersey, a corporation, Appellees, Number 5590, F. 2d .

STATEMENT OF JURISDICTION.

The judgment and opinion aforesaid was rendered by the Circuit Court of Appeals for the Tenth Circuit on December 2, 1957. Jurisdiction is vested in this Court to review said opinion and judgment by Writ of Certiorari by the provisions of Title 28, Section 2101, U.S.C.A.

QUESTIONS PRESENTED FOR REVIEW.

The case presented to the Court of Appeals was one involving the right of the Metropolitan Casualty Insurance Company and Firemen's Insurance Company to escape their obligation, as liability insurers of one Herman E. Johnston, to defend certain personal injury actions brought against him by members of the Elliott family growing out of an automobile collision, or to pay any judgments which the Elliotts might obtain from Johnston.

The insurance companies brought a declaratory judgment action in the United States District Court for the District of Kansas to obtain a judgment relieving them of all responsibility under their policy of insurance on the theory of "non-cooperation" of Johnston, their insured.

The District Court entered a summary judgment in favor of the insurance companies, from which judgment the Elliotts appealed to the Tenth Circuit Court of Appeals. It was the contention of the Elliotts in the District Court as well as in the Court of Appeals that in order for the insurance companies to prevail, it was incumbent on them to establish: (1) a material breach by Johnston of the "cooperation clause" of his policy, and (2) prejudice to the insurance companies in the defense of the Elliotts'

actions against Johnston resulting from Johnston's "non-cooperation." It was the further contention of the Elliotts that there was no substantial evidence in the case either that Johnston materially breached his duty under the terms of his policy, or that the insurance companies were prejudiced by his conduct in the defense of the Elliotts' claims.

The Court of Appeals in a divided opinion affirmed the District Court. The majority opinion held in effect that there was no necessity of a showing of prejudice by the insurance companies in order for them to avoid their policy obligations. The dissenting opinion adhered to the rule that a showing of prejudice was essential in order for the insurers to prevail, and the dissenting Judge saying in his opinion that the record disclosed no substantial evidence of prejudice, held that the judgment of the trial court should have been reversed.

The questions presented for review by this Court are: (1) whether the majority opinion and judgment of the Tenth Circuit Court of Appeals, relieving the insurance companies of their obligation to defend their insured on a basis of the insured's alleged non-cooperation, in absence of substantial evidence of prejudice to the insurance companies, is in error and in conflict, not only with other circuit court decisions on the subject, but in conflict with its own prior decisions on the matter.

(2) Whether the majority opinion of the Court of Appeals is in error and in conflict with the applicable law of the State of Kansas.

STATEMENT OF THE CASE.

The case of Metropolitan Casualty Insurance Company of New York, a corporation, and Firemen's Insurance Company of Newark, New Jersey, a corporation, plaintiffs, vs. Anna Mae Johnston, Herman E. Johnston, Barbara Ann Elliott, Clifford Elliott, Ruby Mae Elliott, a minor, and Mary Ann Elliott, a minor, defendants, was commenced in the United States District Court for the District of Kansas, at Kansas City, by the filing of plaintiffs' (the insurance companies') complaint for a declaratory judgment for the purpose of procuring an adjudication as to the coverage of a combination policy of insurance issued by the Metropolitan Insurance Company of New York and the Firemen's Insurance Company of Newark, New Jersey, to Anna Mae Johnston on February 15, 1952. Jurisdiction in that case was properly vested in the United States District Court for the District of Kansas on the basis of diversity of citizenship of the parties. The plaintiffs' complaint was bottomed on the theory that the insured breached the cooperation clause of the insurance policy, and was for that reason not entitled to coverage. The Complaint (T. 2-15) alleged the issuance of a liability insurance policy by the insurance companies aforesaid, insuring a 1949 Cadillac automobile owned by Anna Mae Johnston, and alleged that on February 11, 1953, one Herman E. Johnston was operating said automobile on U. S. Highway 69 near Arma, Kansas, at which time said automobile collided with the vehicle operated by defendant, Clifford Elliott, in which automobile the other defendants Elliott were riding as passengers. The Complaint alleged that thereafter, on or about June 30, 1954, six actions at law were filed by the Elliott family in the Circuit Court of Vernon

County, Missouri, which actions were tort actions claiming damages to the plaintiffs therein (Elliotts) for alleged injuries growing out of said collision. The Complaint alleged that the defendant, Herman E. Johnston, wrongfully entered into a conspiracy with and acted in wrongful collusion with the defendants, Clifford Elliott, Barbara Ann Elliott, Ruby Mae Elliott, Mary Ann Elliott, and their respective agents and attorneys, in order to permit the Circuit Court of Vernon County, Missouri, to obtain ostensible personal jurisdiction of the said Herman E. Johnston, all in order to obtain some sort of improper, unfair and unjust advantage to the defendants—the Elliott family in prosecuting their actions in the State of Missouri, rather than in the State of Kansas, where such actions would normally and properly have been brought, all of such conduct being in violation of the provisions of the policy of insurance and in derogation of the rights of the plaintiffs herein under the rights of insurance. The Complaint further alleged that thereafter, the insurance companies' attorneys moved to quash the purported service of process in the Missouri actions, which motion was sustained in the Circuit Court of Vernon County, Missouri. The Complaint further alleged that thereafter on February 10, 1955, the defendants, Clifford Elliott and Barbara Ann Elliott, filed an action against the said Herman E. Johnston in the District Court of Crawford County, Kansas, at Pittsburg, and that the defendant, Herman E. Johnston, a resident of Bourbon County, Kansas, acting in violation of the provisions of the policy here involved, wrongfully and collusively entered Crawford County, Kansas, so that ostensible service of process might be had upon him by the Sheriff of Crawford County, all to serve the advantage of the defendants, Clifford Elliott and Barbara Ann Elliott. The Complaint further alleged that Herman E. Johnston concealed and misrepresented certain material facts concern-

ing the accident, and the circumstances concerning the service of process on him in the suits filed in Vernon County, Missouri, and in Crawford County, Kansas. The Complaint further alleged that there was no liability or obligation on the part of appellees to defend the actions at law in the District Court of Crawford County, Kansas, or to pay any sum whatsoever on behalf of Herman E. Johnston, or Anna Mae Johnston, to the Elliotts because of the injuries sustained in the collision aforesaid, and the Complaint then prayed for an adjudication and declaration that the Metropolitan Casualty Insurance Company of New York and the Firemen's Insurance Company of Newark, New Jersey, were neither obligated to defend the actions brought by the Elliotts, or to pay any sum which the Johnstons or either of them might be obligated to pay by reason of their liability for the damages allegedly sustained by the Elliotts.

The defendants Elliott duly answered (T. 16). The defendants Johnston failed to answer or otherwise plead, and were in default. Thereafter, plaintiffs (the insurance companies) moved for summary judgment (T. 17) in accordance with their Complaint, and the defendants, Elliott, also moved for summary judgment (T. 23).

The evidence in support of the insurance companies' Motion for Summary Judgment may be summarized as follows:

At the time of the collision in question, Herman E. Johnston was a resident of Fort Scott, Bourbon County, Kansas, where he was employed as custodian of the VFW Club, but actually made his living gambling (T. 27-28). On February 11, 1953, said Herman Johnston was driving an automobile northward on U. S. Highway 69, approximately six miles north of Arma, Kansas, at which point

he passed a truck in a "no-passing" zone, and had a head-on collision on his wrong side of the road, colliding with the vehicle in which the Elliott family was traveling. He was charged with reckless driving on a complaint filed by John Monahan, Captain of the Kansas State Highway Patrol, and was found guilty by J. Olin Biggs, Judge of the City Court of Pittsburg, Crawford County, Kansas (T. 26). On May 4, 1953, the Elliott family retained Pete Farabi, an attorney of Pittsburg, Kansas, to represent them in civil actions for damages which they sustained in said collision (T. 25). Thereafter, during the summer of 1954, Mr. Farabi went to Herman Johnston's home and asked Johnston if he wanted to be tried in Kansas or Missouri, to which Johnston replied he would rather be tried in Missouri. Johnston's reason for preferring to be tried in Missouri was on account of his occupation—that is, on account of his gambling (T. 30-31). *He felt that he would have a better chance in Missouri* than in Fort Scott (T. 31). Mr. Farabi did not suggest to Johnston that he (Farabi) would like to have the case tried in Missouri (T. 31), Johnston knew that Farabi preferred to sue him in Missouri (T. 33), but he did not know why. Farabi did not tell him why (T. 31, 34). About a month or two months later, Johnston went to Nevada, Missouri, and submitted himself to service of process there (T. 31).

Following service of process on Johnston in the actions filed in Vernon County, Missouri, attorneys for the insurance companies filed motions to quash the service. The Circuit Court of Vernon County sustained the motions and dismissed the actions.

While the actions were pending in Vernon County, Missouri, and before the Circuit Court there dismissed said actions, Barbara Ann Elliott and Clifford Elliott filed actions against the said Herman E. Johnston in the Dis-

trict Court of Crawford County, Kansas. Service was obtained in said actions in Crawford County, Kansas. Thereafter, while the insurance companies' declaratory judgment action was pending in the Federal District Court, and before judgment was entered, the above mentioned cases pending in the District Court of Crawford County, Kansas (State Court), were voluntarily dismissed by the plaintiffs therein, so at the time when the United States District Court sustained the insurance companies' Motion for Summary Judgment in the declaratory judgment action, there were no actions pending either in Crawford County, Kansas, or anywhere in Missouri, growing out of the collision in question.

With respect to the service of process on Johnston in the Crawford County actions, Johnston testified that he went to Crawford County to see a fellow who owed him some money, and while there he was served with the papers (T. 35). He didn't know why these suits were filed and service obtained on him in Crawford County instead of Bourbon County. He didn't know what difference there would be between the two counties (T. 36), but Johnston, because of his occupation, would prefer to be sued in Crawford County (T. 36).

During the course of his testimony in the declaratory judgment action, Johnston testified that in an earlier statement on July 8, 1954, he lied to a Mr. Palmer, a representative of the insurance companies, with reference to certain questions concerning the service of process on him at Nevada, Missouri (T. 37-43).

Johnston also testified in the declaratory judgment action, after the dismissal of the actions in Vernon County, Missouri, that it was still his opinion, in view of the local situation, that both his interest and his insurer's interest would be better served and would receive better results

in Missouri or Crawford County, Kansas, than in Bourbon County (T. 44).

On the basis of the facts as above set forth, the United States District Court sustained the plaintiff insurance companies' motion for summary judgment, and overruled the motion for summary judgment filed by the defendants Elliott, holding, in effect, that the insurance companies were not obligated under their policy of insurance to defend any actions brought by the Elliotts against Johnston, and holding that the insurance companies were under no obligation to pay any judgments which the Elliotts might obtain against Johnston.

Thereafter, the defendants, Elliott, duly appealed to the United States Court of Appeals for the Tenth Circuit, which Court upon hearing arguments in the case, and considering the same, entered its opinion and judgment, review of which is sought in this Court. A copy of the opinion of the United States Court of Appeals is appended hereto.

It will be noted that the case was heard and decided in the Court of Appeals by Judges Murrah, Lewis and Pickett. The Court was divided in its opinion. The majority opinion written by Judge Lewis and concurred in by Judge Murrah, affirmed the action of the trial court in sustaining the insurance companies' motion for summary judgment, but Judge Pickett, in a strong dissenting opinion, disagreed with the majority of the Court, being of the view that the insurance companies should be liable under the terms of their policy to defend the Elliotts' actions against Johnston, and to pay any judgments which the Elliotts might obtain in such actions.

ARGUMENT.

An insurance company seeking to escape its obligations on a policy of liability insurance on a basis of non-cooperation of the insured must establish (1) a material breach of the cooperation clause of the policy by the insured, and (2) prejudice to the insurer in the defense of an action against the insured resulting from the insured's non-cooperation. *State Farm Mutual Automobile Insurance Company* v. *Koval*, (10th Cir.) 146 F. 2d 118; *Levy* v. *Indemnity Insurance Company of North America*, La. App., 8 So. 2d 774; *Associated Indemnity Company* v. *Davis*, C.C.A. N.C., 104 F. 2d 730; *Riggs* v. *New Jersey Fidelity & Plate Glass Co. of Newark, N. J.*, 126 Ore. 404, 270 Pac. 479; *Norwich Union Indemnity Company* v. *Haas*, C.C.A. Ill., 179 F. 2d 827; *Jamison* v. *Farmers Mutual Automobile Insurance Co.*, 181 Kan. 100, 309 P. 2d 394; *Blashfield Cyclopedia of Automobile Law & Practice*, Vol. 6, Part 2, page 78.

Long prior to its decision of the instant case, the Tenth Circuit Court of Appeals, in *State Farm Mutual Insurance Company* v. *Koval*, *supra*, stated the aforesaid rule in the following words:

> "Under the weight of authority, to constitute a breach of a cooperation clause by the insured, there must be a lack of cooperation in some substantial and material respect that results in prejudice to the insurer; whether there has been such a breach is a question of fact; and such a breach is an affirmative defense, the burden of establishing which rests on the insurer." (l.c. 120).

That this rule likewise prevails in the State of Kansas is demonstrated by the language of the Kansas Su-

preme Court in *Jamison* v. *Farmers Mutual Automobile Insurance Company, supra,* where considering non-cooperation of the insured as a means of escape for a liability insurance carrier, the Court said the insurer must "show substantial prejudice to the insurer in defending an action, * * *." (309 P. 2d l.c. 400).

Petitioners contend, as they did in both the District Court and in the Court of Appeals, that the record discloses no substantial evidence either of material non-cooperation by Johnston, or of prejudice to the insurer.

The insurers' claim of non-cooperation of their insured was based on the following conduct of the insured: (1) his action in submitting himself to service of process in the suits filed against him by the Elliotts in Vernon County, Missouri; (2) his being served with process in Crawford County, Kansas, in the two actions brought against him there by Clifford Elliott and Barbara Ann Elliott; (3) his action in giving false information to a representative of the insurance companies relative to the circumstances surrounding the service of process on him in the actions in Vernon County, Missouri.

We submit that the facts and circumstances in this case do not warrant a Declaratory Judgment in favor of the insurance companies, or Summary Judgment in their favor as ordered by the Trial Court, and as held by the Court of Appeals, on any of the theories aforesaid. The record in this case, when considered in its entirety, does not establish a material breach by defendant Johnston of the cooperation clause of his insurance policy.

The respective claims of the Elliotts against Johnston arose out of an automobile collision between an automobile operated by Johnston and an automobile occupied by the Elliotts. The collision occurred on February 11, 1953,

on U. S. Highway No. 69 approximately six miles north of the City of Arma, in Crawford County, Kansas. The Elliotts are residents of Crawford County, Kansas. The defendant Johnston is a resident of Bourbon County, Kansas. There is no suggestion that the Elliotts are related to Johnston or that any relationship exists between them which would be likely to create or encourage any fraudulent or collusive action between them. Apparently they are total strangers. The collision was a head-on collision, resulting from gross and aggravated negligence on the part of the defendant Johnston in crossing over a yellow line to pass a vehicle in a no-passing zone (T. 25, 26). There is no defense that can be seriously presented in opposition to plaintiffs' claims against the defendant Johnston, whether said claims are tried in Bourbon County, Kansas, Crawford County, Kansas, or Vernon County, Missouri, or in any other Court.

There is no intimation anywhere in the record that the plaintiff insurance company was in any way misled or furnished any false information during its investigation of the claim. It can be assumed that it had full notice of the claims and the seriousness thereof very shortly after the accident occurred. The Elliotts did not employ counsel until on or about May 4, 1953 (T. 25). So the insurer had almost three months to evaluate and attempt to settle the claims before counsel was employed by the Elliotts. Mr. Pete Farabi, an attorney of Pittsburg, Kansas, after being employed by the Elliotts, and during the summer of 1954, called on Mr. Johnston at Johnston's home (T. 30). On that visit, Mr. Farabi told Johnston he was going to sue him, and that he would rather sue him in Missouri than in Kansas (T. 67). Johnston did not know why Farabi preferred to sue him in Missouri, but Johnston felt that any place except Fort Scott would be better for

him (T. 30, 31). Accordingly, he went to Nevada, Missouri, and was served.

Nowhere does it appear that the insurance company or any of its representatives had ever instructed Johnston prior to his talking with Mr. Farabi, that he should not talk with Mr. Farabi, and nowhere does it appear that the insurance company or any of its representatives prior to the date of Johnston's being served in Vernon County, Missouri, had ever instructed him to stay away from Vernon County, Missouri, or to avoid being served anywhere outside of Bourbon County, Kansas. It does appear affirmatively that Johnston operates, and did at all times relevant to this action operate, a club at Fort Scott, Kansas, and his business, as he frankly stated in his deposition, is that of a professional gambler (T. 27, 28). It is quite evident that a man engaged in such a business might have very good reason for wanting to be sued some place besides in his home town, and certainly it cannot be inferred that his action in going to Vernon County, Missouri, where he was served with process, even if ~~it be assumed~~ that he went there for that purpose, was a collusive act done for the purpose and with the intention of aiding the Elliotts or giving them some advantage, and in derogation of the rights of the insurance company. His testimony is exactly to the contrary.

Nowhere does the policy of insurance forbid the insured from so maneuvering as to secure a trial in a venue of his choice. It hardly seems fair or just therefore, to permit the insurance company to escape its obligation to defend the Elliotts' actions against Johnston or to pay any judgments which the Elliotts might some day recover against Johnston, simply because Johnston accepted service of process in Vernon County, Missouri, a venue which, according to his testimony, he regarded as being more

favorable to himself than Bourbon County, the county of his residence. Such is true, particularly in absence of evidence of any instructions or warnings on the part of the insurance company to Johnston, alerting him of their wishes in the matter.

It has been held that a waiver of service of process and a voluntary entrance of appearance by an insured in an action against him does not constitute a violation of a policy provision requiring cooperation of the insured. See *Ohio Casualty Insurance Company* v. *Beckman*, Circuit Court of Appeals, 5th Circuit, 74 F. 2d 75. We submit that if a voluntary entry of appearance in an action instituted against an insured does not constitute a material breach of the cooperation clause of the policy, then certainly the voluntary acceptance of service such as we have in our case would not constitute such a breach.

What has been stated above with reference to Johnston's submitting to service of process in Vernon County, Missouri, is likewise applicable to his action in submitting to service in Crawford County, Kansas. Further, with respect to the service on Johnston in Crawford County, the testimony precludes any inference that he voluntarily submitted himself to service there (T. 35, 36).

The only remaining question to consider, then in determining whether the defendant, Johnston, violated the cooperation clause of his insurance policy is that of his having made false statements to the insurance company's investigator, Palmer, with reference to the service of process which was obtained upon him in Vernon County, Missouri. We submit that inasmuch as his conduct in submitting to service in absence of a policy provision forbidding his so doing, and in absence of instructions from a representative of his company to refrain from so doing, does not constitute a breach of his insurance policy, then any statements

which he may have made with reference thereto would be immaterial, and any alleged misstatements in connection with an investigation regarding the service would not constitute a material breach of his policy.

Further, even if Johnston's conduct could be considered a material breach of the cooperation clause of his insurance policy, such conduct would not be sufficient to permit the insurance companies to avoid liability in absence of a showing of prejudice to them in the defense of the Elliotts' actions against Johnston. The record in the case wholly fails to show such prejudice.

Let us consider each act of Johnston complained of by the insurance companies, and see the effect thereof on the defense of the Elliotts' claims.

1. Johnston's action in submitting to service in Vernon County, Missouri.

With respect to this, it is sufficient to say that the suits filed in Vernon County were all dismissed by the Court, and can never be refiled there so that nothing about that proceeding can be prejudicial to the insurance companies. Further, it certainly does not appear as a matter of law that Johnston, by submitting to service there, was acting in bad faith. His testimony shows that he thought he would do better in a trial there than in Kansas, and in absence of instructions from his insurer, was doing what he thought best for him and the company.

2. Johnston's action in being served in Crawford County, Kansas.

What has been said above relative to the Vernon County actions applies equally to the Crawford County actions. Those actions have also been dismissed and are no longer pending. The fact that they were once filed

and service obtained on Johnston can in no way prejudice the insurance companies. Further, it does not appear as a matter of law that Johnston voluntarily made himself available in Crawford County to be served. His testimony is to the contrary.

3. Johnston's false statements to the insurance companies' investigator.

The only false statements charged related solely to the matter of service of process in Missouri. They in no way pertained to the circumstances of the accident and can in no way affect or impair plaintiffs' defense of any actions that will be brought against Johnston in Kansas. Since the Elliotts' actions will not be prosecuted in Missouri, any statements made by Johnston pertaining to the service on him in Missouri, or the events leading up to same are neither material nor prejudicial to plaintiffs' defense of the Elliotts' claims.

Nowhere is there any proof or even suggestion that Johnston has failed to fully or truthfully state to plaintiffs' representatives the facts concerning the accident. Nowhere is there any proof that the Elliotts' claims are fraudulent or unjust or that Johnston is conspiring with the Elliotts or their attorneys in any way to further the prosecution of a fraudulent, unjust or doubtful claim.

Irrespective of the actions filed in Vernon County and Crawford County, and irrespective of statements made by Johnston relative thereto, the Elliotts' actions will now have to be prosecuted in Bourbon County, Kansas—the insurance companies' obvious choice—and they can there be fully defended by the insurance companies without any prejudice.

Judge Pickett in his dissenting opinion clearly points out the absence of any showing of prejudice to the insur-

ance companies in this case. In his dissent, he cites numerous authorities (including *Koval, supra,* decided by the Tenth Circuit Court) which held proof of prejudice to be an essential element of the insurer's case.

We submit that the majority opinion of the Court of Appeals constitutes a radical departure from well established rules governing the subject matter of this case. It conflicts with numerous holdings in other circuits, as well as with the Tenth Circuit Court's own earlier decision. Likewise, it conflicts with the law of Kansas as expressed by the Supreme Court of that State in *Jamison, supra.*

The language contained in Judge Pickett's dissent and the views therein expressed conform directly with the long established and uniform rules governing the question here involved. We respectfully suggest that his dissenting opinion should be the law of the case.

We seek review by certiorari in this case, not only because of the injury which has been done to the Elliott family by the results thus far achieved in this case, but for the further reason that if the rule established by the majority opinion in the Tenth Circuit Court of Appeals be allowed to stand, it will mean that hereafter, the slightest trivial act of so-called non-cooperation by an insured will constitute a gap through which liability insurance companies will be able to avoid their obligations to the public. In this day and time, when the automobile is in such widespread use, and when each year countless numbers of people are injured and killed on the highways, the question here presented is of grave public importance. It is our sincere trust that this Court will accept jurisdiction in this case and review the opinion of the Court below to the end not only that the Elliott family may eventually obtain substantial justice, but to the further end that the public may be protected from the development of a line of decisions

which will give to the insurance companies a great and undue advantage.

Respectfully submitted,

PETE FARABI,
Professional Building,
Pittsburg, Kansas,
EDWARD V. SWEENEY
200 Central,
Monett, Missouri,
Attorneys for Petitioners.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT.

November Term, 1957.

BARBARA ANN ELLIOTT, CLIFFORD ELLIOTT, RUBY MAE ELLIOTT, a Minor, and MARY ANN ELLIOTT, a Minor,

Appellants,

vs.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK, a Corporation, and FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, a Corporation,

Appellees.

No. 5590.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

(Filed United States Court of Appeals, Tenth Circuit, December 2, 1957. Robert B. Cartwright, Clerk.)

Edward V. Sweeney (Pete Farabi was with him on the brief) for Appellants.

Donald N. Clausen (Clausen, Hirsh & Miller and Donald C. Little and Bates & Little were with him on the brief) for Appellees.

Before Murrah, Pickett and Lewis, Circuit Judges.

Lewis, Circuit Judge.

Appeal is taken from a judgment of the United States District Court for the District of Kansas,[1] summarily entered holding that appellees are relieved from any obligation under an automobile liability insurance policy because of the insured's breach of the cooperation clause of the insurance contract.[2] The judgment of the trial court was declaratory under Title 28, U.S.C.A. 2201, and diversity jurisdiction is admitted, 28 U.S.C.A. 1332(a).

The determinative facts are not in dispute. Herman E. Johnston, an insured under the subject policy, was the driver of an automobile involved in a collision with another automobile on February 11, 1953, in Crawford County, Kansas. Substantial claims were made by members of the Elliott family, residents of Crawford County and appellants herein, against Johnston as a result of the collision.

About three months after the accident, the Elliott family retained Pete Farabi,[3] an attorney practicing at Pittsburg, Crawford County, Kansas, to pursue their claims. Farabi contacted Johnston at the latter's home in Bourbon County, Kansas, and told Johnston that he intended to file suit in behalf of the Elliotts and that he preferred to do so in the courts of Missouri rather than

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[1]146 F. Supp. 5.

[2]"The Insured shall cooperate with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation nor incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident."

[3]Farabi appeared upon the brief filed in this court but did not argue the case. None of the conduct attributed to Farabi was participated in by Edward V. Sweeney, who presented the matter on appeal for appellants.

Kansas. Farabi gave Johnston no reason for such preference but later testified that he (Farabi) had had some "unhappy experiences" in trying cases in Bourbon County, the place of Johnston's residence. Johnston agreed to and did travel to Vernon County, Missouri, where he submitted to service of process in six separate actions filed in the state court. The appellee insurance companies, appearing for Johnston in the Missouri trial court under a reservation of rights agreement moved to quash service of process. The Missouri trial court upon its own motion quashed the service and found as a fact that:

> "Plaintiffs' Attorney Farabi, and defendant Johnston wrongfully and fraudulently conspired and colluded together to invoke the processes of this court and its writ of summons caused to be issued in this action by fraudulent acts of plaintiffs' attorney and defendant."

And that: "Plaintiffs, plaintiffs' attorney and defendant have not come into this court with clean hands. This court considers their action a legal fraud upon this court and upon the tax-paying citizens of Vernon County. This court cannot and will not accept jurisdiction of these suits under the circumstances present in these cases."

The trial court was affirmed on appeal to the Supreme Court of Missouri, *Elliott v. Johnston*, Mo. . 292 S.W. 2d 589.

Johnston's deposition has been twice taken. In the second of these he freely admits that the information which he had given the insurance company professing innocence of collusion in the circumstances surrounding the service of process in Missouri, was a "pack of lies" made, he asserts, because of a personal dislike of his interrogator. He does not now dispute that his presence in Missouri was by prearrangement with and at the suggestion of the attorney

Farabi. He asserts, however, that he believes a prejudice exists against him at his place of residence and that it would be to his own advantage to defend litigation at a place other than Bourbon County, Kansas.

Counsel for the Elliotts next obtained service of process against Johnston in Crawford County, Kansas. Although claim is made that this too was done by collusion and prearrangement, Johnston denies the claim. A genuine issue of fact is consequently raised and prevents consideration upon summary judgment of the occurrence beyond the fact of service. *Hunt* v. *Pick*, (10 Cir.) 240 F. 2d 782; *Broderick Wood Products Co.* v. *United States*, (10 Cir.) 195 F. 2d 433. These suits have been voluntarily dismissed and the actions have been refiled and process has been obtained upon Johnston in Bourbon County, Kansas. The actions are now pending.

From this factual background is presented the single question of whether or not Johnston's conduct has been such as to violate the cooperation clause of the insurance contract and thus allow the insurance company to refuse the responsibility of defense and avoid the possibility of indemnity liability. The Johnstons did not appear at trial and have not appealed. The appellants, having no rights against the insurance company except as derived through Johnston's contract, are limited by the conditions of the policy. If Johnston's acts were such as to bar him from the benefits of his policy, the appellants are likewise precluded, *State Farm Mutual Automobile Insurance Co.* v. *Bonucci*, (8 Cir.) 111 F. 2d 412.

As always, when unblessed events are the subject matter of a contract, cooperation between contracting parties is essential to fulfill the contemplated purpose of shifting the financial burden of loss within the terms of the agreement. The inherent nature of the subject matter

of automobile liability insurance necessitates the mutual obligation of cooperation between insured and insurer and clauses in insurance policies comparable to the one here under consideration have long been recognized as reasonable conditions necessary to protect the insurer against collusive claims, *American Automobile Insurance Co.* v. *Fidelity and Casualty Company of New York*, 159 Md. 631, 152 Atl. 523; *Watkins* v. *Watkins*, 210 Wis. 606, 245 N.W. 695, and prejudicial interference with the defense of any claim, *Kindervater* v. *Motorists Casualty Insurance Co.*, 120 N.J.L. 373, 199 Atl. 606. Since the elimination of connivance between the insured and claimant is a basic purpose of the cooperation clause, minor infractions by the insured do not materially threaten the insurer's rights even though lack of cooperation be affirmative in nature. Such situations include discrepancies in statements given by the insured to the company when bad faith is not apparent. *State Automobile Mutual Insurance Company of Columbus, Ohio*, v. *York et al.*, (4 Cir.) 104 F. 2d 730. And when reasonable minds may differ as to the intent of the insured in furnishing false information to the company the question of cooperation should be submitted to the trier of fact. *Standard Insurance Co.* v. *Readnour*, (10 Cir.) 241 F. 2d 14. But where deliberate misstatements are made by the insured which materially harm the company or aid the claimant the policy is voidable by the company. *State Farm Mutual Automobile Insurance Co.* v. *Bonacci*, *supra*, and *Commercial Standard Insurance Co.* v. *Readnour*, *supra*.

There can be no doubt that in the instant case Johnston's admitted "pack of lies" concerning his submission to Missouri process was both intended to mislead the appellee company and to further and aid his collusive understanding with the claimant's counsel. He had con-

sulted with opposing counsel, agreed to lend himself to that attorney's desires, did so, and then falsely testified concerning the arrangement in order to hide the collusion. Upon so clear a showing the insurance company is not bound to defend the case to completion and then show whereby the result would have been different with a co-operative witness. "Such conditions would be robbed of nearly all practical value if in applying them the question of the validity of the professed claim must be investigated. For the purpose of protecting the company against collusion in regard to fabricated or unfounded claims, it is necessary that the conditions should exclude the possibility of such conduct in connection with any claim of any character." *American Automobile Insurance Co.* v. *Fidelity and Casualty Company of New York*, 159 Md. 631, 152 Atl. 523, 526.

Johnston's failure to cooperate with appellee consists not only in his lack of veracity but in his active cooperation with the attorney Farabi. Voluntary submission to process, even though collusive, may not prejudice the defense of litigation to such extent as to amount to a violation of the cooperation clause as where substituted or other service may bring the parties before the same court, *Marcum* v. *State Automobile Mutual Insurance Co.*, 134 W. Va. 144, 59 S.E. 2d 433. And the legal consequences of collusive service may be waived by the company, *Ohio Casualty Insurance Co.* v. *Beckwith*, (5 Cir.) 74 F. 2d 75. But where collusive service to which the insured would not otherwise be amenable is combined with outright falsehood, the combination certainly does not spell out co-operation, *Ems* v. *Continental Automobile Insurance Assn.*, (Mo. App.) 284 S.W. 824; *Buckner* v. *Buckner*, 207 Wis. 303, 241 N.W. 342; *Metropolitan Casualty Co.* v. *Richardson*, (D.C.S.D. Ill.) 81 F. Supp. 310.

Appellants assert however that Kansas law, the interpretation of which must govern this case, is not in accord with the foregoing, citing *Jameson* v. *Farmers Mutual Automobile Ins. Co., Inc.*, 181 Kan. 100, 309 P. 2d 394. In that case the Supreme Court of Kansas held that an insurer cannot disclaim liability under a claim of lack of cooperation by the insured from their inability to locate the policy holder before trial unless substantial and actual prejudice in defending the action is shown. In so holding Kansas follows a line of cases dealing with the voluntary disappearance of the insured prior to trial as an exception to the general principles established in this field. See Appleman, Insurance Law and Practice, sec. 4784, pp. 182, 183, and cases cited in notes 39, 40, 41, 42, and 43. Because of the fact that the insured's unavailability as a witness if viewed as a breach of the cooperation clause would offer temptation to the insurer to spirit him beyond the jurisdiction of the court, these cases have sought to prevent such a result by placing the burden upon the insurer to show that its case was adversely affected by his disappearance.

These cases do not affect the established doctrine that the cooperation cause will be deemed to be violated if the insured by collusive conduct appears to be assisting the claimant in the maintenance of his suit rather than the insurer. See *Bagley* v. *Lumbermens Mutual Casualty Co.*, 99 Colo. 300, 62 P. 2d 469; *Buckner* v. *Buckner*, *supra*; *Storer* v. *Ocean Accident & Guarantee Corp.*, (6 Cir.) 80 F. 2d 470; *State Automobile Mutual Ins. Co.* v. *York*, *supra*; *State Farm Mutual Automobile Ins. Co.* v. *Bonacci*, *supra*.

Affirmed.

Number 5590.

Pickett, Circuit Judge, Dissenting.

The insurance policy in question here provides that "The Insured shall cooperate with the Company and, upon

Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. * * *" No claim is made that the insured failed to perform any of the requirements enumerated in the foregoing clause. Although the provisions of the policy do not prohibit the insured from accepting service in any jurisdiction, the trial court held that the insurance company was relieved of liability only because of the manner in which service of process was obtained in a jurisdiction in which the insured did not reside. Granting that the service of process in Missouri was collusive, I find nothing in the record which would sustain a finding that the insured's conduct in arranging to be served in Missouri was a fraud upon the insurance company, that it violated any provisions of the policy, or that it was material or prejudicial in any way to the defense of the actions. There is no hint that the insured refused to cooperate in defending the actions. The insured did not know the injured parties, and the desire to have the cases tried in a jurisdiction other than that of his residence was personal. The same is true as to the action brought in a Kansas county adjoining the one in which the insured resided. Neither of these cases was tried, and the action is now pending in the county in which the insured resides, where the insurance company is free to present any available defense. So far as the record discloses, the insured has complied with the cooperation clause of the policy in this pending suit.

The causes of action were transitory in nature, and such actions could be maintained at any place where service could be obtained upon the insured. *Elliott* v. *Johnston*, ... Mo. ....., 292 S.W. 2d 589. This is true even though the defense is more costly and inconvenient. *Bavuso* v.

Angwin et al., 166 Kan. 469, 201 P. 2d 1057. If service upon the insured had been valid in a jurisdiction other than that of his residence, it would have been necessary for the insurance company to defend the actions. The Missouri Circuit Court held that service was had in Missouri as a result of a conspiracy between the attorney for the injured parties and the insured, which amounted to a fraud upon the Missouri courts. But, the Supreme Court of Missouri affirmed the decision not because of collusion or fraud upon the court, but upon the right to apply the doctrine of forum non conveniens in transitory actions without statutory authority. *Elliott v. Johnston, supra.* The court said: "* * * there was no fraud in its true meaning in the filing of the suits in Vernon County and the procurement of the service of process." It was further stated that "The plaintiffs had existing claims against Johnston 'under the law of another state' and could therefore institute their actions in Missouri, providing they were able to obtain service of process upon the defendant. * * * 'It is not a fraud to do what the law permits', * * *." The effect of the decision, I think, is that there was nothing wrong in bringing the actions and accepting service in Missouri. The court said: "So, there was appropriate venue and personal service of process and the Circuit Court of Vernon County had jurisdiction of the parties and the subject matter and consequently of the actions * * *." The case is now pending where the insurance company says it should have been brought in the first instance, with no showing that the activities in Missouri injured or prejudiced it in any way.

The trial court concluded as a matter of law, that the cooperation clause was violated when the insured conspired with the injured parties to subject himself to service of summons in Missouri and in Crawford County, Kansas, and by giving the insurance company's representative false

and misleading information in connection with the service.[1] We held in *State Farm Mutual Automobile Ins. Co.* v. *Koval*, 146 F. 2d 118, that "Under the weight of authority, to constitute a breach of a cooperation clause by the insured, there must be a lack of cooperation in some substantial and material respect that results in prejudice to the insurer; whether there has been such a breach is a question of fact; and such a breach is an affirmative defense, the burden of establishing which rests on the insurer." See also *State Farm Mut. Auto. Ins. Co.* v. *Palmer*, 9 Cir., 237 F. 2d 887; *Standard Accident Ins. Co. of Detroit, Mich.*, v. *Winget*, 9 Cir., 197 F. 2d 97; 29 Am. Jur., Ins., § 789; Blashfield's Cyclopedia of Automobile Law and Practice, Perm. Ed., Vol. 6, Part 2, § 4059, pp. 78-81. Considering the entire record, and all the possible results from the conduct of the insured, I am of the view that there is no substantial evidence which shows that the insurance company has been prejudiced in any way. The case is now ready for trial in the county where apparently the insurance company thinks it should be tried. Unless the insured fails to cooperate in the defense of that action, as required by the policy, there is no reason why the insurance company should be relieved of its obligation under the policy because the insured and the attorney for the injured parties colluded to have the action tried in another jurisdiction, which collusion had no effect upon the defense to the actions. The end result is that the insurance company got what it wanted. I would reverse the judgment.

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[1]The so-called "pack of lies" of the insured related only to the reasons for agreeing to submit to service of process away from his residence. They had nothing to do with the defense to the actions.